IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 256 of 1990

1. Maruti Siddappa Masekar
2. Mallappa Sidappa Masekar
3. Smt. Savakka Govind Belwatkar....Appellants

(Orig.plaintiffs)

V/s

Babu Govind Kangralkar ..Respondent

(Orig.defendants)

Mr.C.R.Dalvi with Mr.Rahul S. Kate for Appellants

Mr.R.A.Thorat for Respondent

CORAM:S.R.SATHE,J.

DATED:27th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of 4th Additional District Judge, Kolhapur in Regular Civil Appeal No.273 of 1985

whereby the order passed by the court of the Civil Judge,J.D., Chandgad in Regular Civil Suit NO.73 of 1980, decreeing the plaintiff's suit for declaration and perpetual injunction was set aside, the appeal was allowed and plaintiff's suit was dismissed, the original plaintiffs have preferred this second appeal.

2. For the sake of convenience herienafter the parties shall be referred to as the plaintiffs and defendant.

3. The brief facts giving rise to this second appeal are as under :

. The plaintiff nos.1 and 2 are real brothers. Their father Sidappa Masekar purchased the suit land bearing Survey No.98/1 admeasuring 4 Acres 35 1/2 gunthas situated at village Tudiye, Taluka Chandgad by registered sale deed in the year 1943. To the northern side of the suit land there is defendant's land bearing Survey No.98/2. In the year 1965 the defendant started obstructing the plaintiffs possession of the northern portion of the plaintiffs' land. Plaintiffs therefore, filed Regular Civil Suit NO.47 of 1965 against the defendant for perpetual injunction restraining

defendant from obstructing the plaintiffs' possession of the suit land. The said suit was opposed by the defendant by contending that the defendant is not owner of the suit land but plaintiff's father had agreed to sell the suit land to the defendant's father and accordingly executed an agreement to sell after accepting amount of Rs.200/- and put the defendant's father in possession of the suit land and since then the defendant is in possession of the suit land. Defendant also contended that he is owner of the suit land. The said suit was decreed in plaintiffs' favour.

4. Being aggrieved by the said order the defendant filed first appeal No.122 of 1969. The same was allowed and plaintiffs' suit was dismissed on 11-6-1971 by holding that the defendant was in lawful possession of the suit land and plaintiffs had failed to prove their possession. Second appeal No.665/71 filed against the said order was also dismissed on 23-12-1977.

5. It is alleged by the plaintiffs that after the decision of the earlier suit the defendant with the help of revenue officers and on the basis of decision in Second Appeal No.665 of 1971 got his

name entered into the record of rights in respect of northern portion admeasuring 1 Acre 28 gunthas and at that time Survey no.98/1 was separated into Survey Nos. 98/1B admeasuring 1 Acre 28 gunthas and Survey No.98/1A for remaining portion of the land. The plaintiffs were shown as owners of the said land bearing No.98/1A and land bearing No.98/1B is in possession and enjoyment and was shown in the name of defendant. Plaintiffs, therefore placed strong objection for the said entry. According to the plaintiffs though the plaintiffs were exclusive owner of the suit land and the land was in their possession the defendant started obstructing plaintiffs'' possession of the said land. Plaintiffs therefore filed present suit No.73 of 1980 on 17-12-1980 and prayed for declaration that they are the absolute and exclusive owners of the suit land i.e. northern 1/3rd portion admeasuring 1 Acre 28 gunthas out of original Survey no.98/1 which is subsequently numbered as 98/1B and also prayed for possession and perpetual injunction.

6. The defendant filed his written statement at Exh.26 and contended that in view of decision in earlier suit no.47 of 1965 plaintiffs' suit No.73 of 1980 is barred by principle of res judicata. He also contended that plaintiff is not entitled to get

declaration as prayed for. Besides this according to the defendant the suit for declaration was also barred by law of limitation. He further contended that plaintiff's father had executed an agreement to sell dated 25-8-2004 in favour of his (defendants) father and he was also put in possession of the suit land and since then the land was continuously in possession of the defendant's father and after defendant's father he is in possession of the said land. Hence on all these grounds defendant prayed for dismissal of the suit.

7. On the pleadings of the parties the trial Court framed issues at Exh.68. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the plaintiff has proved his title and possession over the suit land while defendant has failed to prove his adverse possession. He also held that the suit is not barred by principles of res judicata. The trial Court therefore decreed the suit in plaintiffs' favour by allowing relief of declaration and perpetual injunction.

8. Being aggrieved by that, the defendant filed first appeal in the Court of District Court, Kolhapur. The first Appellant court noticed that

the finding recorded by the trial Court was not legal and correct. According to the first appellate court plaintiffs had failed to prove their title to the suit property and on the contrary defendant had established ownership by adverse possession. Besides this according to the first appellate court the suit for declaration was barred by law of limitation and the suit regarding perpetual injunction was barred by principles of res judicata. The learned Additional District Judge, therefore, allowed the appeal and dismissed the plaintiffs' suit.

9. The plaintiffs have challenged the order of dismissal of their suit in this second appeal. At the time of admission on 11-6-1990 this Hon'ble Court has passed the following order:

> "The question about the plea of res judicata on title and adverse possession by a person in possession with an agreement of sale and absence of plea under Section 53A of the Transfer of Property Act are substantial questions of law. Appeal admitted".

10. In this appeal before me Mr.C.R.Dalvi, learned

Advocate for the Appellant has urged three points. Firstly, he submitted that the order passed by the first Appellate Court holding that the plaintiff has failed to prove his title to the suit property and the suit regarding declaration of title is barred by limitation is not legal and correct. Secondly he canvassed before me that first appellate Court has wrongly held that the defendant has become the owner of the suit land by virtue of adverse possession. Lastly, he submitted that the present suit was not barred by principle of res judicata. As against this the leaned Advocate for the Respondent supported the judgment and order passed by the first appellate Court. He submitted that right from the year 1943 the defendant is in possession of the suit land and even in earlier suit in the year 1965 the defendant had contended that the plaintiff is not the owner but defendant is the owner of the suit land. Thus, the defendant has become the owner by adverse possession. Besides this he also submitted that in any event the plaintiff is not entitled for possession and permanent injunction as prayed because the defendant is in possession of the suit land by virtue of an agreement to sell executed on 25-8-1943 and as per provisions of section 53A of Transfer of Property Act, defendant’s possession has to be protected.

11. It is not in dispute that initially entire land admesuring 4 Acres 3 1/2 gunthas was numbered as S.No.908/1 and the same was purchased by defendant's father Siddappa by virtue of a sale deed executed in the year 1943. It is also evident from the record that on 25-8-1943 the plaintiffs' father hd executed an agreement to sell in respect of the suit land i.e. 1/3rd northern portion of Survey no.98/1 in favour of defendant's father and he was put in possession at that time. Admittedly, the plaintiffs had filed Regular Civil Suit No.47 of 1965 for perpetual injunction against the defendant and in that suit though the decree was passed in favour of the plaintiff by the trial court the same was set aside by the first appellate court and ultimately the plaintiff's suit was dismissed by the High Court on 23-12-1977 holding that the plaintiffs failed to prove their possession of the suit land. It is the contention of the defendant that the said decision in earlier suit operates as res judicata and as such the present suit is not maintainable. It is not in dispute that the earlier suit and present suit are between the same parties and subject matter of the suit is same. However, main submission of the learned Advocate for the plaintiffs in this behalf is that issue with regard to the title was not at

all directly and substantially an issue in the earlier suit and as such it cannot be said that the decision in earlier suit operates as res judicata. Admittedly, the earlier suit was suit simplicitor for permanent injunction. In order to find out as to what was the issue that was directly and substantially involved in the earlier matter, it is necessary to peruse the plaint in that suit and the issues framed therein. Admittedly in that suit the plaintiffs had not sought any declaration to the effect that they were owners of the suit land but they had simply filed suit for permanent injunction alleging that the land in question was in their possession but the plaintiffs obstructed to their possession. From perusal of the judgment of the trial Court in said Regular Civil Suit No.47 of 1965 it is very clear that there was absolutely no issue as to whether the plaintiff has proved his title to the suit property nor there was any issue as to whether defendant has proved that he was become owner by adverse possession. It was tried to be argued on behalf of the defendant that though the issue regarding ownership was not properly framed, impliedly the said issue was involved in the earlier suit and accordingly it may observed. However, from the perusal of the judgment in earlier proceedings viz. Regular Civil Suit No.47 of 1965, First Appeal

No.122 of,1969 and Second Appeal No.665/1971. We find that the courts had not even considered impledly the issue with regard to the plaintiffs ownership to the suit property or the issue regarding adverse possession of the defendant. So, I think that finding recorded by the first appellate Court to the effect that issue regarding plaintiffs' ownership and consequential declaration to that effect is not barred by principle of res judicata is legal and correct and there is no substance in the arguments advanced by the learned Advocate for the defendant in this behalf.

12. It is true that earlier suit was for permanent injunction and the present suit is for permanent injunction. However, merely because of that we cannot jump to the conclusion that finding recorded in the said suit operates as res judicata. Ultimately, so far as the suit for injunction is concerned, according to the plaintiffs the present suit was based on fresh cause of action. So material point is to find out as to whether plaintiffs were in actual possession of the suit land on the date when subsequent suit was filed. So considering that aspect it must also be said that even suit for permanent injunction is not barred by principle of res judicata.

13. It is an admitted fact that land bearing Survey NO.98/1 was initially purchased by the plaintiffs' father Sidappa by virtue of a registered sale deed executed in the year 1943. Not only that, but we find that since the year 1943 the name of the defendant's father was entered in the record of rights in holder's column and the said entries were never disturbed till the year 1979. In fact it does appear that in the year 1949 some portion of Survey No.98/1 i.e. northern portion admeasuring 1 Acres 28 gunthas was agreed to be sold to the defendant's father and accordingly plaintiff's father had executed an agreement to sell by accepting Rs.200/- and put in defendant' father in possession of the suit land. It is also an admitted fact that the defendant did not produce any document to show that land in question is actually purchased by him or his father. It has been shown that the said land stands in the name of said other persons. So considering this position it was in fact necessary for the appellate court to hold that plaintiff is owner of the suit land. Of course, while considering the issue regarding ownership and giving finding in that behalf it was necessary to consider the issue regarding adverse possession. The defendant has contended that right from the year 1943 the land was

in possession of defendants' father and subsequently it is in possession of the defendant. In fact from perusal of the judgments in the earlier proceedings it is very clear that by virtue of the agreement to sell dated 25-8-2003 defendants father was put in possession of the suit land. There is nothing on record to show that plaintiffs or plaintiffs' father had actually received the said possession from the defendants at any time. So, it does appear that since 1943 the defendant is in possession. Even at the time of earlier proceedings it was conclusively held by the High Court that the plaintiff had failed to prove his possession and as such the injunction was denied. However, merely because the defendant was continuously in possession, we cannot jump to the conclusion that defendant has become owner by adverse possession. In order to acquire title by adverse possession, it is necessary for the party i.e. defendant to establish all essential ingredients that are required for adverse possession. Merely because the defendant has contended in the earlier suit while filing the written statement in the year 1965 that plaintiff is not owner but he is owner, it cannot be said that defendants had set up title by adverse possession at that time. On the contrary we find that even at that stage it was the contention of the defendant

that plaintiff's father had put the defendant's father in possession of the suit land by virtue of agreement to sell. So it was in fact permissive possession under contract. To establish the title by adverse possession it is incumbent on the party to show that the possession was not only continuous and open but it was hostile. It is needless to say that whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. In the instant case if we take into consideration the acts or conduct of the defendants or his father, we find that right from the year 1943 to 1979 at no point of time they preferred any application to get their name entered as owner in the record of rights. Not only that but the defendants have even admitted in his cross examination that at times he had in fact paid the revenue assessment of the land in question to the plaintiffs. That itself shows that all along defendant or his father were treating the plaintiffs as owner of the suit land and there was no animus to hold the property adversely.

15. Thus it is very clear that the finding recorded by the first appellate court to the effect that the plaintiff is not the owner of the suit land and the defendant has become the owner by adverse possession

is not legal and correct. On the contrary, it does appear that the plaintiff is the owner of the suit land and his suit for declaration to that effect is also not barred by law of limitation. So, to that extent the order passed by the first appellate Court has to be set aside.

. Of course, merely because plaintiff has proved the ownership it cannot be said that he is entitled for possession under the circumstances of the case.

. In view of above, the appeal is partly allowed. The plaintiff’s suit for declaration that he is the owner of the suit land is decreed in his favour. The plaintiff’s suit for possession of the suit land and permanent injunction is dismissed.

. Considering the peculiar facts and circumstances of the case, there is no order as to costs.

(S.R.SATHE,J.)